tem of pleading used in New York. It is doubtful whether the decision would have been received by the press in general, as it has been, as a denial of the right to privacy, were the jurisdictions of law and equity distinguished, and certainly it would have been more easily limited to its proper scope. As has been intimated, it cannot fairly be complained of, however much some of the reasoning of the opinion may seem to need further exegesis to gain acceptance.

RECENT CASES.

AGENCY — LIABILITY OF SERVANT TO THIRD PERSONS. — The agents of a corporation charged with the duty of erecting on its grounds structures for the accommodation of the public negligently permitted a defective structure to be erected. *Held*, that they were guilty merely of nonfeasance, and therefore were not liable to persons injured by reason of such defects. *Van Antwerp* v. *Linton et al.*, 35 N. Y. Supp. 318.

There is no doubt that when an agent is guilty merely of nonfeasance he is responsible therefor to his principal alone. *Lane* v. *Cotton*, 12 Mod. 472; *Felton* v. *Swan*, 62 Miss. 415. It is when we attempt to draw the line between nonfeasance and misfeasance that the question becomes a puzzling one. The court here follows previous decisions in New York, as well as the weight of authority in other jurisdictions, in limiting the definition of misfeasance to the violation of a duty imposed upon the agent independently of his employment. *Burns* v. *Pethcal*, 75 Hun, 437; *Delaney* v. *Rochereau*, 44 Am. Rep. 456. By the terms of this definition, nonfeasance only can be attributed to the defendants; and there would seem to be no good distinction between the negligent performance and the negligent omission of performance of a duty imposed by an employer, when in both cases injury results to third persons. The authorities are not wanting, however, which declare the first to be misfeasance, and the second nonfeasance. *Osborne* v. *Morgan*, 130 Mass. 102.

BILLS AND NOTES — ANOMALOUS INDORSER — GUARANTOR — STATUTE OF FRAUDS. — Defendant indorsed in blank a note after delivery and while in the hands of payee. Parol evidence showed that he intended to assume the liability of guarantor. *Held*, such act authorizes the payee to write over the signature the contract of guaranty in full, and this constitutes a sufficient memorandum in writing to satisfy the Statute of Frauds. *Peterson* v. *Russell*, 64 N. W. Rep. 555 (Minn.).

This is the first time the point in question has come up for decision in Minnesota. The authorities are divided. In *accord*, see *Kealing* v. *Vansickle*, 74 Ind. 529; *Beckwith* v. *Angell*, 6 Conn. 315; *Stowell* v. *Raymond*, 83 Ill. 120. *Chaddock* v. *Vanness*, 35 N. J. Law, 517, cited by the court as authority, is not in point. The New Jersey decisions are *contra* to the principal case. See *Hayden* v. *Weldon*, 42 N. J. Law, 128. For further authorities holding that a blank indorsement of a note in the hands of the payee does not satisfy the Statute of Frauds, and that payee has no authority to fill in the contract of guaranty, see *Temple* v. *Baker*, 125 Pa. St. 634; *Culbertson* v. *Smith*, 52 Md. 628. For the three doctrines applied where the anomalous indorsement is made before delivery to payee, see 7 HARVARD LAW REVIEW, 373.

CARRIERS — SLEEPING CARS — RIGHT TO TRANSFER USE OF SECTION FOR PART OF JOURNEY. — *Held*, that a purchaser of a sleeping car section, who leaves the train before reaching his destination, may transfer the use of the section to another passenger for the rest of the journey. *Curlander* v. *Pullman Palace Car Co.* (Baltimore Superior Court). See NOTES.

CARRIERS — WRONG TICKET — EJECTION FROM TRAIN. — *Held*, that where a passenger requests and pays for a ticket to A. and by a mistake of the ticket agent is given a ticket to B. only, with which he enters the train without noticing the error, he has a right to ride to A. on making proper explanations to the conductor; and can recover from the company for ejection by the conductor at B. *Evansville & T. H. R. R. Co.* v. *Cates*, 41 N. E. Rep. 712 (Ind.). See NOTES.

CHOSE IN ACTION — ASSIGNMENT — NOTICE TO DEBTOR — PRIORITY. — *Held*, a prior assignee of a chose in action will be protected, though he has given no notice of the assignment either to the subsequent assignee or the obligor. *Fortunato* v. *Patten*, 41 N. E. Rep. 572 (N. Y.).

This doctrine is well settled in New York. *Fairbanks* v. *Sargent*, 104 N. Y. 108, and is in accord with the weight of American authority. *Putnam* v. *Story*, 132 Mass. 205; *Kennedy* v. *Parke*, 17 N. J. Eq. 415; *Meier* v. *Hess*, 32 Pac. Rep. 755 (Ore.). The English doctrine is that the first assignee giving notice is protected, following the rule in *Dearle* v. *Hall*, 3 Russ. 1. The Federal courts and a few of the State courts have adopted this rule. *Methven* v. *Staten Island Light Co.*, 66 Fed. Rep. 113; *Van Buskirk* v. *Hartford Fire Ins. Co.*, 14 Conn. 140; *Murdock* v. *Finney*, 21 Mo. 139.

CONFLICT OF LAWS — FOREIGN CONTRACTS — PUBLIC POLICY. — Goods were shipped on an English vessel from Germany to Philadelphia; the contract, made in Germany, exempted the ship owner from liability for the negligence of master or crew, and provided that disputes should be settled according to the law of the ship's flag. The plaintiff's goods were damaged at Philadelphia through the negligence of the crew. *Held*, although such contracts are valid in Germany and in England, they are considered against public policy here, and will not be enforced. *The Glenmavis*, 69 Fed. Rep. 472.

If this contract had been made in America, most of our courts would have held it unenforceable. 2 Parsons on Contracts, 8th ed., 259. Nor will the courts of one nation respect the laws of another when such a course is against public policy. Westlake, Private Internat. Law, § 215. It may be doubted, however, whether a contract like this, made abroad, offends against American interests; public policy may demand that we preserve a high standard of care in our community by forbidding our people to sell their vigilance, but if such an act is done in a German community it is a question of German, not of American policy, and there would seem to be no reason for refusing to give effect to the foreign law. *Forepaugh* v. *Delaware, &c. R. R. Co.*, 128 Pa. St. 217. The doctrine of the principal case appears, however, to have been adopted by the Federal courts. *Lewisohn* v. *National Steamship Co.*, 56 Fed. Rep. 602. See Hutchinson on Carriers, §§ 140–144 *a*.

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — WAIVER OF TWELVE JURORS. — The defendant by his consent was tried for a felony by a jury of eleven men, and upon conviction he moved for a reversal of judgment. *Held*, that in a case of felony the defendant could not waive his constitutional right to a trial by a full jury of twelve men. *Territory* v. *Ortiz*, 42 Pac. Rep. 87 (N. Mex.). See NOTES.

CONSTITUTIONAL LAW — SELF-INCRIMINATING TESTIMONY — STATUTORY PROTECTION AGAINST PROSECUTION. — *Held*, (1) that the Fifth Amendment to the United States Constitution does not protect a witness from giving testimony which merely tends to reflect upon his character; (2) that an act of Congress, providing that no person shall be excused from testifying in proceedings under the Interstate Commerce Act on the ground that it may tend to criminate him, but that no person shall be prosecuted or subjected to any penalty on account of anything concerning which he may testify, is constitutional, since it affords a protection as broad as the constitutional provision. *Brown* v. *Walker*, 70 Fed. Rep. 46.

The first point is well settled. *U. S.* v. *Smith*, 4 Day's R. 121; 1 Greenleaf on Evidence, § 454, and cases cited. The second point overrules the decision in *U. S.* v. *James*, 60 Fed. Rep. 257, thus bringing the Federal rule into line with the majority of State decisions upon the same point. *People* v. *Kelly*, 24 N. Y. 74; *People* v. *Sharp*, 107 N. Y. 427; *Wilkins* v. *Malone*, 14 Ind. 153; *State* v. *Quarles*, 13 Ark. 307; *Higdon* v. *Heard*, 14 Ga. 255. See, *contra*, *Cullen* v. *Com.*, 24 Grat. 624; *Counselman* v. *Hitchcock*, 142 U. S. 597. Compare *Emery's Case*, 107 Mass. 172.

CONSTITUTIONAL LAW — TRIAL BY JURY. — The Constitution of Kansas provides that "the right of trial by jury shall be inviolate." The petitioner was summarily convicted under a city ordinance, forbidding that which the State laws made a penal offence generally, and applies for his discharge on *habeas corpus* under the above provision. *Held*, that since an appeal lay from the city court to a court in which a trial by jury was secured, the summary proceeding was not in conflict with the Constitution, if the appeal was "clogged by no unreasonable restrictions"; that since in this case the appeal was conditioned "for the payment of such fine and costs as shall be imposed on him, if the case shall be determined against the appellant," it was unreasonably restricted. *Re Jahn*, 41 Pac. Rep. 956 (Kan.).

In regard to the first point, there is a conflict of authority. A previous Kansas case, *Emporia* v. *Volmer*, 12 Kan. 622, and cases in several other States, support this decision. The authorities are collected in 1 Dill. Mun. Corp. (4th ed.) § 439, and in Cooley, Const. Limit. (5th ed.) 506, 507. See especially *Beers* v. *Beers*, 4 Conn. 535, and *Jones* v. *Robbins*, 8 Gray, 329. In *Callan* v. *Wilson*, 127 U. S. 540, the opposite

conclusion is reached in a case concerning the common law offence of conspiracy, and for the present purpose there seems no distinction between a common law and a statutory offence. The doctrine of the Supreme Court is consonant with the established regard for the rights of the citizen, but the decision of the principal case has practical grounds of convenience and despatch. On the second point, the decision seems correct. Cooley, Const. Limit. (5th ed.) 507, and cases cited. See NOTES.

CONTRACTS — DEFENCE — FRAUD. — Plaintiff sued on a written instrument, purporting to be a contract between plaintiff and defendant. Defendant pleaded that an oral contract had been entered into between plaintiff and defendant, under which plaintiff agreed to purchase a safe; that plaintiff fraudulently represented to defendant that the document sued on embodied the terms of the oral contract, whereas in fact the alleged promise of defendant in the written instrument substantially differed from defendant's promise in the oral agreement; that defendant, relying on plaintiff's representation, signed the instrument sued on. The lower court struck out this plea on the ground that it varied a written contract by oral evidence. *Held*, that this was error. *Wood* v. *Cincinnati Safe Co.*, 22 S. E. Rep. 909 (Ga.).

Clearly a correct decision; the object of the plea was not to vary the written agreement, but to show that it conferred no enforceable rights on plaintiff. This case suggests the inquiry whether the facts disclosed constitute an affirmative personal defence or a negative defence to be pleaded under non-assumpsit. Under certain circumstances the answer to this inquiry determines the question of a defendant's liability. In *Foster* v. *Mackinnon*, L. R. 4 C. P. 704, the defendant, who was sued as an indorser of a promissory note, had written his name on the back of the instrument, relying on a fraudulent representation that he was signing a guaranty; an instruction that defendant, if not guilty of negligence, was not liable to plaintiff, an innocent purchaser for value, was held correct. It would therefore seem that in the principal case the defence was properly non-assumpsit. Pollock on Contracts, 5th ed., 441–466.

CORPORATIONS — LIMITATION OF THE INDEBTEDNESS OF A CITY. — A State constitution provided that no city "shall become indebted in any manner" over a certain amount. *Held*, this does not prohibit a city already indebted to said amount from borrowing money to finish waterworks, if the loan is to be paid out of a special fund created by the receipts derived from such waterworks, as this imposed no further liability on the general funds of the city. *Winston* v. *City of Spokane*, 41 Pac. Rep. 888 (Wash.).

Two judges out of the five who sat on the case dissent, and the question is undoubtedly a close one. Those who loaned the money must go at the special fund, and cannot claim payment out of the general city funds even in quasi-contract, it seems. The city would be liable for failure to create the special fund, and damages could be claimed from the city's general funds. But the majority of the court thought such liability too remote.

CORPORATIONS — POWER TO TAKE FORBIDDEN PROPERTY BY DEVISE. — Bill by widow and heirs to construe a will. The will directed a trustee to sell certain warehouse property and pay the proceeds to the defendant corporation. The proceeds of the sale were in the trustee's hands. The corporation's charter forbade it to take and hold property over a certain amount, and plaintiffs contended that this limit was already reached. *Held*, this question can be raised only by the State. *Hanson* v. *Little Sisters of the Poor*, 32 Atl. Rep. 1052 (Md.). See NOTES.

CRIMINAL JURISDICTION — BRINGING STOLEN GOODS INTO STATE. — *Held*, that the common law rule, that, where one steals goods in one country and brings them into another, the latter has no jurisdiction of the offence, applies to the different States of the Union. *Strouther* v. *Commonwealth*, 22 S. E. Rep. 852 (Va.).

The case is right. Several States, it is true, allow conviction in similar cases, on the ground that the States are in the same relative position as the English counties. *State* v. *Ellis*, 3 Conn. 185; *State* v. *Hamilton*, 11 Ohio, 435; *Comm.* v. *Holder*, 9 Gray, 7. But the anomaly, which made each new act of removal across a county line accompanied with the felonious intent, a complete new crime, and yet allowed one conviction to bar an indictment anywhere else, was not extended to thefts in Scotland, or to the Channel Islands. *Reg.* v. *Anderson*, 2 East P. C. 772; *Rex* v. *Prowes*, 1 Mood. C. C. 349. On the actual facts the doctrine cannot stand, for the thief certainly gets possession by the original act; and it is submitted that though this objection may be waived in a set of counties where only one Legislature exists, and only one conviction can be had, it is an insuperable obstacle to any application of the rule to this country. The criminal laws of the States differ in important respects, are not derived from the

same source, and are entirely free from control by the central government. In *accord* with the principal case are *State* v. *Le Blanch*, 2 Vroom, 82; *State* v. *Beall*, 15 Ind. 378; and see the dissenting opinion of Thomas, J., in *Comm.* v. *Holder*, *supra*.

CRIMINAL LAW — MURDER AND MANSLAUGHTER. — Defendant was indicted for the murder of a person who attempted to arrest him without a warrant. The court charged that such unwarranted arrest was in general sufficient provocation to reduce the crime to manslaughter, "unless such killing was done in such a way as to show brutality, barbarity, and a wicked and malignant purpose." On conviction this writ of error was brought. *Held*, that the question of manslaughter or murder does not depend on the way in which the killing was done, and that the charge was erroneous. *Brown* v. *United States*, 16 Sup. Ct. Rep. 29.

This is a sound decision. The question of fact for the jury is whether a certain state of mind existed in the defendant at the time of killing. This they must do from evidential facts, but it is not for the judge to charge that any particular facts are conclusive. See *Terre Haute, &c. Railroad Co.* v. *Voelker*, 129 Ill. 540.

DAMAGES — EMINENT DOMAIN. — Where a city opens a street across the right of way of a railroad, the verdict of a jury giving nominal damages only is sustained. *Chicago, &c. Railroad Co.* v. *Cicero*, 41 N. E. Rep. 640 (Ill.).

There was evidence in the case of a depreciation in value of that part of the right of way occupied by tracks, and the market value of the part not so occupied was also shown. But the court says that the usual rule of compensation to individuals does not apply to this case, and refuses to allow any recovery. The cases cited would seem to show that this is the established doctrine in Illinois. It does not seem satisfactory, however, the better rule being that laid down in *B. & A. Railroad* v. *Cambridge*, 159 Mass. 283: "The ruling that the petitioner was entitled to recover for the fair value of its land taken, subject to its use for railroad purposes, was correct."

EQUITY — INJUNCTION — RELIGIOUS CORPORATIONS. — Where a church has been incorporated under a State statute as a member of a particular denomination, and acquired property as such, it cannot, without the unanimous consent of its members, transfer its property to another branch of the denomination which holds different doctrines. *Park et al.* v. *Champlin et al.*, 64 N. W. Rep. 674 (Ia.).

Where property to which no specific trust is attached has been acquired by a church which professes a particular faith, there is some diversity of opinion as to the rights of a majority of its members in case they wish to change their allegiance. The New York courts, interpreting their statute, do not recognize any denominational character in religious corporations, and the rights of a majority therein are the same as in any lay corporation. 2 R. S. of 1813, § 3; *Robertson* v. *Bullions*, 11 N. Y. 243; *Watkins* v. *Wilcox*, 66 N. Y. 654. Michigan has followed New York in this respect. *Wilson* v. *Livingstone*, 99 Mich. 594. As a general rule, however, in the case of churches which acknowledge themselves members of a larger communion which exercises a more or less efficient supervision over their belief, the minority which is in accord with the tenets of the governing body will be given the property as against a seceding majority. See *Smith* v. *Pedigo*, 33 N. E. Rep. 777 (Ind.); *Church* v. *Whitmore*, 83 Ia. 147; *Roshi's Appeal*, 69 Pa. St. 462; *Baker* v. *Ducker*, 79 Cal. 365.

ESTOPPEL — MISREPRESENTATION OF BOUNDARY BY VENDOR. — Plaintiff bought a lot of land adjoining defendant's lot. In erecting a building thereon he built up to a line, pointed out by defendant as the boundary, but which in fact was several feet within defendant's lot. This action is brought in equity to enjoin defendant's interference with his possession. *Held*, that though defendant was in "honest error," he is estopped to deny the boundary indicated by himself. *Ross et al.* v. *Penn et al.*, 64 N. W. Rep. 283 (Ia.).

This case indicates the present tendency of the doctrine of estoppel. According to the overwhelming weight of earlier authority, no representation estopped its maker unless it was made with knowledge of its falsity, or at least when he was "bound to know the true state of things." Bigelow on Estoppel, 5th ed., chap. xviii. sec. 3. In this light, on much the same facts as found in the present case, an opposite conclusion was reached in *Liverpool Wharf* v. *Prescott*, 7 Allen, 494. Authorities are being found more plentifully every year in support of the position that wilful falsehood or reckless ignorance is not necessary to create an estoppel; that it is enough if a representation has been made in pure error, on which the other party has been induced to act. Bispham's Principles of Equity, 5th ed., §§ 283, 288, and cases cited.

EVIDENCE — CHARACTER — FALSE IMPRISONMENT. — *Held*, evidence to establish the previous good character of plaintiff in a suit for false imprisonment is inadmis-

sible, where no attempt has been made to assail it. *Diers* v. *Mallon*, 64 N. W. Rep. 722 (Neb.).

It seems fairly well settled that the defendant, for the purpose of showing probable cause, may introduce evidence of the general bad character of the plaintiff. *Isreal* v. *Brooks*, 23 Ill 575; *Bacon* v. *Towne*, 4 Cush. 240; *Martin* v. *Hardesty*, 27 Ala. 458. But there is some authority *contra*; *Ryburn* v. *Moore*, 77 Tex. 85; Greenleaf on Evidence, Vol. I. sec. 54, Vol. II. sec. 458. Presumably, where defendant is allowed to put in evidence of the general bad character of the plaintiff, the latter would be allowed to rebut it by evidence of general good character, though there seem to be no direct decisions on this point. In *accord* with the principal case are *Cochran* v. *Toher*, 14 Minn. 385; *Association* v. *Fleming*, 3 S. E. Rep. 420 (Ga.). Directly *contra* is the recent case of *Funk* v. *Amor*, 7 Ohio C. C. 419, holding that the plaintiff may introduce evidence of his own good character in the first instance. The authorities on the question are very meagre.

LIFE INSURANCE — SUICIDE — INSANITY. — This was an action to recover on an insurance policy. The defence was suicide, and the reply insanity at the time of death. The court charged that suicide was in general a ground of forfeiture in such a case as a breach of an implied condition, and that if the man understood the wrongfulness of his acts the amount could not be recovered. The only question for the jury was "whether his mind was so impaired that he could not properly comprehend the character of the act he was about to commit. *Ritter* v. *Mutual Life Ins. Co. of New York*, 69 Fed. Rep. 505.

There is on this general question an irreconcilable conflict of opinion, but on the facts the above charge is erroneous. There was conclusive evidence to show that the deceased knew "the consequences of his deed to himself and others," and under these circumstances the decided preponderance of authority and the strongest arguments support the view that the company is not liable, though the insured was at the time under an insane delusion which rendered him morally and legally irresponsible. *Dean* v. *Amer. Mut. L. Ins. Co.*, 4 Allen, 96; *St. Louis Mut. L. Ins. Co.* v. *Graves*, 6 Bush, 268; *Van Zandt* v. *Mut. Ben. L. Ins. Co.*, 3 Ins. Law Journal, 208; *Borradaile* v. *Hunter*, 5 M. & G. 639. And see Bliss on the Law of Life Insurance, 2d ed., §§ 228–243.

PERSONS — DIVORCE — EXTREME CRUELTY — MENTAL SUFFERING. — The plaintiff petitioned for a divorce from her husband for extreme cruelty. The cruelty alleged was his commission of sodomy with a beast. *Held*, that such conduct was extreme cruelty, as tending to cause mental suffering that would affect the health, and exciting apprehension of the communication of disease. Divorce granted. *Anonymous*, 2 Ohio Nisi Pr. 342.

In the absence of statutory definition, it is generally settled that cruelty sufficient to justify divorce consists of conduct that injures, or may reasonably be apprehended to injure, the physical health of the complainant. *Kelly* v. *Kelly*, L. R. 2 Prob. & Div. 31; *Sylvis* v. *Sylvis*, 11 Col. 319; 1 Bish. Marr., Div. & Separ. § 1563. In some States mere mental suffering not injurious to mental or bodily health is considered sufficient. *Palmer* v. *Palmer*, 45 Mich. 150. But such doctrine is strongly denied elsewhere. *Bailey* v. *Bailey*, 97 Mass. 373. When mental suffering is so great that it may reasonably be apprehended to produce physical ill-health, divorce ought to be granted, and it is the decision of this difficult question of fact that gives courts an opportunity to relax the spirit of the rule while following its letter. The present case, is perhaps an instance of such relaxation, and is not undesirable. But somewhat *contra*, see *W*—— v. *W*——, 141 Mass. 495. Compare *Russell* v. *Russell*, 11 *The Times* Law Rep. 579, noticed in 9 HARVARD LAW REVIEW, 222.

PRACTICE — JOINT JUDGMENT — FAILURE TO SERVE ON PARTY — ENFORCEMENT. — *Held*, a judgment of a court of one State, rendered against three defendants jointly in an action in which one of them was not served with process, cannot be enforced in another State by an action of debt thereon against one of the defendants who in the original action was served with process. The plaintiff who sues on a judgment must recover against all the defendants or none; for, the judgment being an entirety, whatever constitutes a good defence for one of the defendants operates also for the benefit of the others. *Watson* v. *Steinan*, 33 Atl. Rep. 4 (R. I.).

A glance at the authorities cited shows that the point is well settled; in fact, no case has been found which disputes the position taken. Judgments in actions upon joint contracts are distinguished, under a local statute. *Nathanson* v. *Spitz*, 31 Atl. Rep. 690 (R. I.). Of the authorities cited in the principal case, see especially *Burt* v. *Stevens*, 22 N. H. 229; *Donnelly* v. *Graham*, 77 Pa. St. 274; *St. Louis* v. *Gleason*, 15 Mo. App. 25. *Oakley* v. *Aspinwall*, 4 N. Y. 514, contains an elaborate discussion of

the matter, though, as remarked in a note by the learned reporter, the exact point was not decided. As to "Joint Debts Acts," see the opinion of Mr. Justice Bradley, in *Hall* v. *Lanning*, 91 U. S. 168, cited in *Nathanson* v. *Spitz, supra.*

PROPERTY — ADVERSE POSSESSION BY TENANT IN COMMON. — Land was devised for life with remainders over, and plaintiff and defendant were remaindermen, and entitled to claim as tenants in common. *Held*, this did not preclude the defendant's acquiring the whole land by adverse possession, she having inherited the land from her father, who claimed under a deed from the life tenant purporting to convey a fee, and having held adversely to plaintiff for the statutory period. *Mole* v. *Folk et al.*, 22 S. E. Rep. 882 (S. C.).

A co-tenant may oust his fellow by adverse claim, though it is hard to show a distinct intention to do so. In the principal case such an intention appeared. Defendant inherited a fee, as she thought, absolutely from her father, and had probably never heard she was entitled under any instrument but that under which her father held. She claimed adversely to plaintiff and also to herself, so to speak. There is no question here, as in *Board* v. *Board*, L. R. 9 Q. B. 48, of estoppel from claiming adversely, as defendant never claimed in remainder under the instrument giving her that right.

PROPERTY — APPLICATION OF MAXIM "PENDENTE LITE NIHIL INNOVETUR." — Plaintiff brought a bill to recover land on the ground of fraud, and set out the facts on which he relied to show fraud. Later, an amendment was allowed setting out additional facts to show fraud. On these additional facts plaintiff obtained a decree. Between the time of filing the bill and its amendments, defendant conveyed to a third party who had notice of the facts relied on under the original bill, and, being satisfied that those facts were insufficient to show fraud, had purchased the estate. *Held*, as the amendment did not change the subject matter of the suit, but merely specified additional matters of proof on the same ground of recovery, i. e. fraud, the suit was the same throughout, and the doctrine of *lis pendens* applies. *Turner* v. *Houpt*, 33 Atl. Rep. 28 (N. J.).

The court begins by remarking that the maxim of *lis pendens* is not based on implied notice to all the world of the facts which constitute the grounds of the suitor's claim, but is only notice of the existence of a suit in regard to the matter in dispute, and that where the suit is in regard to property, people purchasing the property do so at their peril as to the result of the suit. Pomeroy, 2 Eq. Jur. §§ 632 *a*, 633, and cases cited. It follows from this, that the purchaser's notice of the facts to establish fraud in the bill as originally filed in the case at bar, and his reliance on them, are immaterial as regards the doctrine of *lis pendens*, and that the vendee brought *pendente lite*, as the insertion of further allegations of the same character as those put in the original bill did not alter the identity of the suit as to the parties, subject matter, or purpose, and consequently that the suit under which plaintiff won was the same as that pending at the time of the purchase of the land. *Gibbon* v. *Dougherty*, 10 Ohio St. 365.

PROPERTY — EASEMENT — PRESCRIPTION. — Light had come to the plaintiff's windows over the defendant's premises for a period of nineteen years and nine months. The defendant then started to erect a building that would interfere with the light. The Prescription Act made no interruption of user effective which existed less than one year. *Held*, that the plaintiff had no easement of light at the time of filing the bill, and therefore the court would not enjoin the defendant from building. *Battersea* v. *Commissioners*, [1895] 2 Ch. 708.

Sect. 3 of the Prescription Act, 2 & 3 Wm. IV. c. 71, provides that the right to light shall become absolute after twenty years' enjoyment without interruption, and sect. 4 provides that interruption must be at least one year in duration. This has been construed to make the defendant powerless after the end of the nineteenth year to prevent the acquisition of an easement over his property at the end of the twenty years. *Flight* v. *Thomas*, 8 Cl. & F. 231. This might make a very hard case on the defendant, who, during the twentieth year, should erect valuable buildings in ignorance of the plaintiff's claim, only to be compelled to remove them at the end of the year. It would not seem a matter to be regretted that prescription acts in this country do not contain a provision similar to sect. 4 of the English act.

PROPERTY — EXCEPTION AND RESERVATION — PROFIT À PRENDRE. — A person conveyed his mill-site, situated on a dam, "excepting and reserving the right of running logs through the premises from the river, and of erecting and maintaining a log-sluice from the mill-pond, about five feet in width." There was no sluice-way existing at the time of the grant. *Held*, the grantor thus obtained rights, either as an exception of a part of the thing granted, or a *profit à prendre*, which he could convey independently of

his remaining property. The absence of the word "heirs" does not limit the right to the life of the grantor. *Ring* v. *Walker*, 33 Atl. Rep. 174 (Me.).

Courts in order to carry into effect the intention of the parties, have before this adopted the conception that land contains within itself certain undeveloped rights, as rights of way, etc., capable of exception in this unperfected shape, and capable of subsequently springing into full existence. *Winthrop* v. *Fairbanks*, 41 Me. 307; *Karmuller* v. *Krotz*, 18 Iowa, 359; *Bowen* v. *Connor*, 6 Cush. 132. The difficulty with the case seems to be in calling the right excepted a *profit à prendre*, and so capable of inheritance and assignment, as distinguished from an easement in gross. The language of the deed seems decisive against considering it as an exception of the land itself on which the sluice-way was to be built.

PROPERTY — PERCOLATING WATER — RIGHT OF DIVERSION — MOTIVE. — Water passed by percolation from the defendant's land to that of plaintiff, and supplied a large spring on the plaintiff's land. The defendant, with the intention of injuring the plaintiff, and so to induce him to buy out his land, or make him some other compensation, commenced operations, the effect of which would be to divert the percolating water away from the plaintiff's spring. *Held*, affirming [1895] 1 Ch. 145, defendant has an absolute right to appropriate or divert the water percolating through his soil, irrespective of his motive in so doing. *The Mayor, &c. of Bradford* v. *Pickles*, [1895] App. Cas. 587.

When this point has come up for direct decision in this country, in regard to the use of property, it seems generally to have been decided, in accordance with the doctrines of the principal case, that the malice or negligence of the defendant is immaterial. *Chatfield* v. *Wilson*, 28 Vt. 49; *Elster* v. *Springfield*, 30 N. E. Rep. 274; *Phelps* v. *Nowlen*, 72 N. Y. 39; *Mahan* v. *Brown*, 13 Wend. 261. But see, *contra*, *Chesley* v. *King*, 74 Me. 164; *Greenleaf* v. *Francis*, 18 Pick. 117; *Wheatley* v. *Baugh*, 25 Pa. St. 528; *Haldeman* v. *Bruckhart*, 45 Pa. St. 514; *Bassett* v. *Company*, 43 N. H. 569; *Swett* v. *Cutts*, 50 N. H. 439; *Roath* v. *Driscoll*, 20 Conn. 533; *Panton* v. *Holland*, 17 Johns. 92; *Bartlett* v. *O'Connor*, 36 Pac. Rep. 513. See also Angell on Watercourses (6th ed.) 114*l*–114*o*. It would seem that whether one's right to appropriate percolating water is absolute or merely relative is a question, the determination of which, as in the case of malicious interference with business, depends largely on policy.

PROPERTY — PRESCRIPTIVE RIGHT TO REPAIRS. — Payment by owners of land for more than twenty years of an annual sum, toward repairs on a dam situated on a stranger's premises, subjects the land to a servitude to pay that sum annually. *Whittenton Mfg. Co.* v. *Staples*, 41 N. E. Rep. 441 (Mass.). See NOTES.

SALES — CONDITION RESTRICTING OBJECTION TO TITLE — SPECIFIC PERFORMANCE REFUSED. — The defendant, at auction, bought of the plaintiff a leasehold interest in certain land, paying £30 deposit. One condition of the sale was that the purchaser should "not make any requisition or objection" in respect to a certain intermediate title, but should assume a good title in the assignees, under whom vendor claimed, for the residue of the term. The defendant on examination found plaintiff's title worthless, and refused to go on. This is an appeal from an action for specific performance brought by the vendor. *Held*, that since plaintiff could not convey any title it would be manifestly unjust to decree specific performance, though the contract may be good enough in law. Nor will the deposit be recovered, as there is no personal equity entitling the defendant to such a decree. The parties must abide by their legal remedies. *Scott* v. *Alvarez*, [1895] 2 Ch. 603.

This decision, though without an exact precedent, seems sound. The purchaser entered into this contract fully warned of the condition of the vendor's title, and no equity has arisen to entitle either to a decree. The court is sound in allowing an inquiry into the intermediate title when specific performance is demanded. *Jones* v. *Clifford*, 3 Ch. D. 779. The deposit would not be recoverable at law, as there has been no fraud nor breach of contract on the part of the vendor. *Corrall* v. *Cattell*, 4 M. & W. 734. It seems probable, indeed, that the vendor could recover damages from the vendee for his breach, though the amount would be inconsiderable.

STATUTE OF LIMITATIONS — NEGLIGENCE OF PUBLIC OFFICER — WHEN ACTION ACCRUES. — A register of deeds recorded a mortgage from A. to B., but failed to index it, and in a few months went out of office. After more than six years, which was the period of limitation, C. advanced money on the same land, supposing from the index that it was unencumbered. The land was sold to pay the prior mortgage, A. became bankrupt, and C. sued the register. *Held*, the breach of duty was a complete cause of action, and, as the register could not commit a breach after the end of his term, the

tatute begun to run at the end of that term, at least. *State ex rel. Daniel* v. *Grizzard*, 23 S. E. Rep. 93 (N. C.).

The theory of the case is that a negligent breach of official duty is in itself an invasion of the rights of all members of the class likely to be affected by it. Such a doctrine is fantastic on its face, and entirely at variance with the principle that actual damage is an essential part of an action for negligence. *Bank, &c.* v. *Waterman*, 26 Conn. 324; *Roberts* v. *Read*, 16 East, 215; and a strong dissenting opinion in *Betts* v. *Norris*, 21 Me. 314. And if the right to sue is complete at once, why should not the statute attach immediately, rather than at the end of the term? In accord with the principal case is a late decision by the same court in *Shackelford* v. *Staton*, 23 S. E. Rep. 101.

TORTS — LOCALITY OF OFFENCE. — A laborer working in the hold of a vessel, which was being loaded with lumber, was struck and injured by a plank, sent without warning down a chute by a person on the pier. *Held*, the jurisdiction of the tort is determined by the locality of the damage, not by that of the cause of damage. *Herman* v. *Port Blakely Mill Co*, 69 Fed. Rep. 646.

The case cannot be distinguished from that of a man on one ship struck by a bullet from a gun on another; *U. S.* v. *Davis*, 2 Sumner, 482; or on the shore; *Coombe's Case*, 1 Leach, 432. The determining point is the last physical act which affected the person struck. In the cases cited the act was intentional, but the principle applies equally to an act of negligence. The damage to the plaintiff, the substantial part of the cause of action, is the same, and this accrues at the moment of actual contact of the destructive agent. Abundant authority supports the principal case. *The Plymouth*, 3 Wall. 20; *Leonard* v. *Decker*, 22 Fed. Rep. 741; *The Maud Webster*, 8 Ben. 547.

TORTS — MALICIOUS INTERFERENCE WITH BUSINESS — CONSPIRACY. — The local officers of a branch of the National Association of Master Plumbers notified the wholesale dealers in plumbing materials in the State not to sell to the complainants, who were not members of the association, under the penalty, in case of their continuing to do so, of losing the trade of the members of the association. This notification was in pursuance of resolutions adopted at a convention of the association. *Held*, no conspiracy, for what was done was lawful and done in a lawful manner. The desire to free themselves from the competition of the complainants was a sufficient excuse to prevent the act from being the violation of a legal right. *Macauley* v. *Tierney*, 33 Atl. Rep. 1 (R. I.).

Interesting as the latest decision on a much vexed question. See NOTES, 8 HARVARD LAW REVIEW, 510. The court cites with approval the English case of *Mogul Steamship Co.* v. *McGregor*, in which the question was practically the same. The question is one of policy rather than theory. See Mr. Justice Holmes's article, 8 HARVARD LAW REVIEW, 1.

TORTS — UNFAIR COMPETITION — FRAUDULENT SIMULATION. — Plaintiff had built up a large trade for his store, known as the "Mechanic's Store." Defendant, a competing trader, moved his establishment to a building adjoining plaintiff's, and labelled his store the "Mechanical Store." Plaintiff on his lot put up a building of very distinctive appearance, in which he continued his business. Defendant on his adjoining lot erected a building exactly similar to plaintiff's, as regards the appearance of the lower stories. In using the name "Mechanical Store," and in erecting his building, defendant intended to and did induce the public to buy of him, thinking they were trading with plaintiff. *Held*, defendant would be enjoined from using the name "Mechanical Store," and would be required to distinguish his store from plaintiff's. *Weinstock* v. *Marks*, 42 Pac. Rep. 142 (Cal.).

The result reached in the principal case, an eminently satisfactory one from all standpoints, is fully sustained by the authorities cited in the well reasoned opinion by Garoutte, J.: "Manufacturers . . . have no right to beguile the public into buying their wares under the impression they are buying those of their rivals." Brown, J., in *Coats* v. *Merrill Thread Co.*, 149 U. S. 562, at 566. In *Pierce* v. *Guitard*, 66 Cal. 68, 8 Pac. Rep. 645, a defendant was enjoined from using an imitative label. *Schmidt* v. *Brieg*, 100 Cal. 672, 35 Pac. Rep. 623, *semble*. As pointed out in the opinion, defendant's liability must be the same whether he has pirated plaintiff's trade by the use of an imitative label or an imitative store front. 9 HARVARD LAW REVIEW, 291.

TRUSTS — NOTICE TO BENEFICIARY. — Where a bank depositor changes a deposit in his own name to one in trust for his brother, but retains the bank-book until after his brother's death, and testifies that he never intended his brother to have the deposit, *held*, no trust arises in favor of his brother's administrator. *Cunningham* v. *Davenport*, 41 N. E. Rep. 412 (N. Y.).

This case does not impugn the previous New York decisions to the effect that, when

a depositor opens an account in trust for a third party without notifying the beneficiary and dies having the book in his possession, and leaving the account unexplained, a trust arises in favor of the third party. Where no real trust is intended, and the depositor simply uses another's name for purposes of his own, his intent may always be shown, and will be controlling. See Ames's Cases on Trusts, Ch. I. § 13.

WILLS — DESTRUCTION OF SUBSEQUENT INSTRUMENT. — A statute declared that "no will nor any part thereof shall be revoked except . . . by some other will or codicil in writing" duly executed. Testator destroyed a second will, which did not contain an express clause revoking his first. *Held*, first will was valid. *Cheever* v. *North*, 64 N. W. Rep. 455 (Mich.).

The court says the statute merely declared the common law rule, and that the former will was not revoked by the subsequent one by that rule. It also says the destruction of the second instrument revives the first will. Revival is making good something hitherto void. But the court had declared that the first will never was void. So the doctrine of revival is hardly applicable, but the decision that the first will had never been revoked was sufficient to dispose of the case. At common law a subsequent will did not revoke a previous one, *Hutchins* v. *Bassett*, 2 Salk. 592, even if the subsequent one contained the words, "this is my last will." *Lemage* v. *Goodfan*, L. R. 1 P. & D. 57. The case of *Peck's Appeal*, 50 Conn. 562, is in accord with the principal case under a similar statute, and cites various authorities.

WILLS — ISSUE LIVING — CHILD EN VENTRE SA MÈRE. — *Held*, that a child *en ventre sa mère* is to be deemed living not only for his own benefit, but also for that of others. *In re Burrows*, [1895] 2 Ch. 497. See NOTES.

REVIEWS.

THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I. By Sir Frederick Pollock, Bart., M.A., LL.D., Corpus Professor of Jurisprudence in the University of Oxford, and Frederic William Maitland, LL.D., Downing Professor of the Laws of England in the University of Cambridge. Cambridge: At the University Press, 1895. 2 vols. 8vo, pp. xxxviii, 678, and xiii, 684.

Here, truly, one finds "the gladsome light of jurisprudence"! It is good to have lived to see the day when such a book can be printed, a book in which technical learning is presented accurately and exactly, and yet in a manner so engaging. The literary gift which has shaped these volumes is remarkable; but the combination of this quality with a strong intellectual grasp and easy mastery of all the recondite learning which finds expression here is far more remarkable. This is not only a learned and valuable book, but a delightful one.

The space allowable in these columns does not permit any review of the work at all worthy of its merits. Let us, however, make sure that the scope of the work is understood.

In a short Introduction the authors point out that they are not undertaking any philosophical discussion of the nature of law. Law they conceive of as "the sum of the rules administered by courts of justice." They declare that the law prevailing in England before the Norman invasion "was, in the main, pure Germanic law," not Celtic or Roman. Of that period of the early law they are to speak very briefly. They are to stop at the reign of Edward I., because the period since that date is intimately linked in with our modern law; "the law of the later middle ages . . . has never passed utterly outside the cognizance of our courts and our practising lawyers." Constitutional history and law, and ecclesiastical matters they are to leave one side. "We have thought less," they say "of symmetry than of the advancement of knowledge. The time for